SUNNYSIDE RECLAMATION & SALVAGE, INC.

IBLA 90-214 Decided October 30, 1992

Appeal from a decision of the Utah State Office, Bureau of Land Management, readjusting coal lease U-039706.

Affirmed in part; set aside in part; case remanded.

1. Coal Leases and Permits: Leases--Coal Leases and Permits: Readjustment

   The 20-year readjustment interval stated in coal leases issued prior to enactment of the Federal Coal Leasing Amendments Act of Aug. 4, 1976, 30 U.S.C. §§ 201, 209 (1988), was converted to a 10-year readjustment interval by that Act. Although a failure to provide timely notice of readjustment at the end of a 20-year period is treated as a Departmental waiver of its right to impose new or additional terms and conditions, this waiver does not extend to the period between readjustments set by the Act, and a lease may be readjusted at the end of the next 10-year period.

2. Coal Leases and Permits: Leases--Coal Leases and Permits: Readjustment

   Pursuant to 43 CFR 3473.3-2(a)(3) (1989), royalty for coal removed by underground methods will be 8 percent unless the lessee establishes that conditions warrant a lower amount, but in no case shall the lease term provide for less than 5-percent royalty for coal removed by underground operations. Where there is an indication of ongoing underground mining and the existence of plans for further underground mining, the case will be remanded to determine whether conditions warrant aroyalty rate less than 8 percent.

APPEARANCES: Denise A. Dragoo, Esq., Salt Lake City, Utah, for appellant.

OPINION BY ADMINISTRATIVE JUDGE KELLY

Sunnyside Reclamation & Salvage, Inc. (Sunnyside), has appealed a January 17, 1990, decision by the Utah State Office, Bureau of Land Management (BLM), readjusting coal lease U-039706 effective July 1, 1990.

Coal lease U-039706 1/ was issued effective July 1, 1960, under authority of the Mineral Leasing Act of 1920, 30 U.S.C. § 207 (1988). Kaiser Steel Corporation acquired the lease effective May 1, 1965. Under the statute and section 3(d) of the lease, the lease became subject to readjustment at the end of its primary 20-year term, on July 1, 1980. In Kaiser Steel Corp., 76 IBLA 387, 392 (1983), the Board held that BLM had waived its right to readjust the lease at the end of its primary term because it had failed to transmit to the lessee the readjusted lease terms within the time specified in its notice of intent to readjust. By notice of November 29, 1983, BLM acknowledged the waiver.

Effective February 1, 1986, BLM approved an assignment of U-039706 from Kaiser Steel to Kaiser Coal Corporation. On March 9, 1989, Kaiser Coal Corporation filed an assignment of the lease to Sunnyside. By decision of February 9, 1990, BLM approved that assignment effective March 1, 1990.

BLM's authority to readjust the lease effective July 1, 1990, stems from section 207 of the Federal Coal Leasing Amendments Act of August 4, 1976 (FCLAA), 30 U.S.C. §§ 201, 209 (1988), and 43 CFR 3451.1(a) which provides in part: "(a) (1) All leases issued prior to August 4, 1976, shall be subject to readjustment at the end of the current 20-year period and at the end of each ten-year period thereafter." BLM's decision states that by notice of June 30, 1988, Kaiser Coal Corporation was notified that the terms and conditions of readjustment would be provided no later than 2 years from the date of the notice, in accordance with 43 CFR 3451.2. Enclosed with BLM's decision were the terms and conditions of readjustment, effective July 1, 1990.

[1] On appeal Sunnyside contends that BLM waived its right to readjust the lease until July 1, 2000. Sunnyside cites Wyodak Resources Development Corp. v. Lujan C-89-0057J (D. Wyo. Dec. 20, 1989). The court ruled in Wyodak that "[t]o the extent that the regulations suggest that pre-1976 leases are automatically converted to ten-year readjustment intervals by operation of law, the regulations are invalid as being not in accordance with the law" (Slip Op. at 7). However, in Wyodak Resources Development Corp. v. Lujan, No. 90-8025 (10th Cir. Jan. 15, 1991), the circuit court overruled the district court, holding that FCLAA's 10-year readjustment interval takes effect automatically when the Secretary waives the first post-FCLAA readjustment opportunity (Slip Op. at 7-8). Thus, the 20-year readjustment interval stated in coal leases issued prior to enactment of FCLAA was converted to a 10-year readjustment interval by that Act. Although failure to provide timely notice of readjustment at the end of a 20-year period is treated as a Departmental waiver of its right to impose new or additional terms and conditions, this waiver does not extend to the period between readjustments set by the Act, and a lease may be readjusted at the end of the next 10-year readjustment period. See Wyodak Resources Development Corp., 106 IBLA 339, 345 (1989).

1/ Coal lease U-039706 embraces 2,559.16 acres in Tps. 13 and 14 S., R. 13 E., Salt Lake Meridian, Carbon County, Utah.

Next, Sunnyside objects to the readjusted production royalty rate of the lease. Section 2(a) of the lease as readjusted sets that rate at "8% of the value of coal produced by underground mining methods." Sunnyside discusses economic, geologic, hydrologic, and locational considerations which it asserts justify a reduction in royalty rate from 8 to 5 percent. Sunnyside requests that we remand this issue for a determination by BLM as to whether conditions warrant a 5-percent rather than an 8-percent royalty rate. Finally, Sunnyside objects to eight special stipulations included in section 15 of the readjusted lease. These stipulations deal with cultural resources, endangered species, location of power lines, dust suppression, monitoring the effects of mining, prevention of surface subsidence, and removal of surface structures. Sunnyside asserts that these stipulations are unnecessary, burdensome, and duplicative.

The royalty and stipulation issues have apparently not been addressed by BLM prior to the appeal, and BLM has filed no answer in this case.

[2] The pertinent regulation, 43 CFR 3473.3-2(a)(3) (1989), 2/ calls for a royalty rate at readjustment of not less than 8 percent for coal removed from an underground mine "except that the authorized officer may determine a lesser amount, but in no case less than 5 percent if conditions warrant." In Coastal States Energy Co. v. Hodel, 816 F.2d 502 (10th Cir. 1987), the court held that it was error for the Department automatically to fix the readjusted royalty at 8 percent for all coal recovered from underground mining operations because to do so ignored the proviso in the regulation that a lesser amount could be set "if conditions warrant." In so holding, the court noted that its interpretation of the regulation was in accord with the interpretation espoused by the Board in Utah Power & Light, 80 IBLA 180 (1984). In Kanawha & Hocking Coal & Coke Co., 112 IBLA 365 (1990), we set aside and remanded a BLM decision where the record failed to disclose a rational basis for BLM's conclusion that conditions did not warrant a royalty rate lower than 8 percent. We noted, however, that the appellant in Kanawha stated that its coal lease was "included in a current underground mining permit and underground operations are presently being conducted." Id. at 367 n.4.

By contrast, in Ark Land Co., 97 IBLA 241, 247 (1987), dismissed, Ark Land Co. v. Hodel, No. 87-254K (D. Wyo. Mar. 23, 1988), we found that there was "no indication * * * that any underground operations are occurring or that any resource recovery and protection plan * * * has been tendered which embraces such operations [3/]." We held that in absence of either ongoing underground mining operations or pending specific proposals to commence underground mining, a lessee could not establish that "conditions warrant"

2/ 43 CFR 3473.3-2(a)(3) was amended effective Jan. 26, 1990 (55 FR 2664). The pertinent provision, now found at 43 CFR 3473.3-2(a)(2), reads: "A lease shall require payment of a royalty of 8 percent of the value of coal removed from an underground mine."

3/ 43 CFR 3482.1(b) addresses the requirements of resource recovery and protection plans to be submitted by coal operators and lessees.

a royalty rate of less than 8 percent for coal removed by underground operations. Accordingly we affirmed the imposition of the 8-percent royalty rate for coal removed by underground methods as part of the readjusted lease terms. 4/

In the case at bar, there is an indication of ongoing underground mining and the existence of plans for underground mining (Statement of Reasons at 7). Consequently, if this indication can be confirmed, an examination by BLM of whether a royalty of less than 8 percent would be appropriate appears warranted. Therefore, we conclude BLM's imposition of the 8-percent royalty rate as one of the conditions of readjustment should be set aside and the case remanded. On remand, BLM should confirm whether there is ongoing underground mining or the existence of plans for such mining. If either exists, BLM should determine whether a royalty of less than 8 percent is warranted.

Lastly, we note that Sunnyside's challenge to the stipulations has not been addressed or adjudicated by BLM. Prior to such adjudication there is nothing for the Board to review. Accordingly, we conclude this case should be remanded to allow BLM to consider and address this challenge. Once BLM has considered this issue it should assure that its conclusions are supported by a rational basis and that such basis is stated in its written decision as well as being demonstrated in the accompanying administrative record. See Kanawha, supra at 368; Ark Land Co., supra at 247-48.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, BLM's decision is affirmed in part, set aside in part, and the case is remanded for action consistent with this opinion.

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John H. Kelly
Administrative Judge

I concur:

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James L. Byrnes
Chief Administrative Judge

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4/ We also allowed the lessee to avail itself of the relief afforded by 43 CFR 3473.3-2(d) (1989). Id. at 247 n.1.